Supreme Court, U.S.
FILED

No. 10-964

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In the
Supreme Court of the United States

ROBERTO ROMERO, M.D.,
Petitioner,

v.

IRINA BUHIMSCHI, M.D.; YALE UNIVERSITY,
Respondents.

On Petition for Writ of Certiorari to the United States Court of Appeals for the Sixth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1.

In *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), the Court stated in *dictum*, that a claim under the Lanham Act, 15 U.S.C. § 1125(a)(1), "would undoubtedly be sustained if Dastar had bought some of New Line's Crusade videotapes and merely repackaged them as its own."

(a) Do scientific data in a medical article, published in a medical journal that is offered for sale to the public, constitute a communicative product to which the Lanham Act applies?

(b) Did Respondents "repackage" data they co-produced with Petitioner in Detroit, Michigan, and violate Section (a)(1)(A) of the Lanham Act, by publishing the identical data, and creating confusion within the scientific community as to where the research was conducted and by whom, by falsifying the date of the first experiments, removing Petitioner's name from publication, using designations that obfuscated where the research was performed, and falsely characterizing the data in a press release as work produced at Yale University by a "Yale team"?

2.

In dismissing Petitioner's defamation claims on summary judgment, did the Sixth Circuit deny Petitioner the process he was due under the Fifth and Seventh Amendments to the U.S. Constitution, and

depart so far from well-settled procedures as to call for the exercise of this Court's supervisory power,

(a) by disregarding and misstating material facts, and failing to correct the omissions and misstatements after they were brought to the court's attention; and

(b) by basing its interpretation of Michigan law entirely on unpublished cases and cases that had no precedential value in Michigan, instead of Michigan Supreme Court cases, including a case decided during the pendency of Petitioner's appeal that was drawn to the court's attention?

PARTIES TO THE PROCEEDINGS

Petitioner, Roberto Romero, M.D., was the plaintiff-appellant below. Respondents Irina Buhimschi, M.D., and Yale University, were defendant-appellees below. Claims against Carl Weiner, M.D. and the Royal College of Obstetricians and Gynecologists, defendants below, were dismissed under Fed. R. Civ. P. 12(b)(6), and the decision was not appealed.

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OPINIONS BELOW

The Sixth Circuit's opinion, affirming dismissal of Petitioner's Lanham Act claim for failure to state a claim, and grant of summary judgment on his defamation claims, is unpublished, and reprinted in the Appendix to this Petition (App.) at pages 1a to 28a.

The district court's opinion granting summary judgment on Petitioner's defamation claims is reproduced at App. 29a-59a, and the court's opinion denying Petitioner motion for reconsideration is reproduced at App. 60a-90a.

The district court's opinion adopting the Magistrate's Report and Recommendation, dismissing Petitioner's Lanham Act claim, but denying Respondents' motion to dismiss his defamation claims, is reprinted at App. 91a-104a, and the Magistrates Report and Recommendation is reproduced at App. 105a-148a.

The letter denying a petition for *en banc* review is reprinted at App. 149a-150a.

JURISDICTION

The Sixth Circuit affirmed the lower court decisions on September 13, 2010, App. 1a, and a petition for *en banc* review was denied on October 26, 2010. App. 149a-150a. Therefore, this petition is timely filed under Supreme Court Rule 13.1, and this Court has jurisdiction pursuant to 28 U.S.C. § 1254(1).

STATUTORY AND CONSTITUTIONAL PROVISIONS INVOLVED

Relevant sections of the Lanham Act, 15 U.S.C. § 1125(a)(1)(A), are reproduced at App.151a, and provide:

> (1) Any person who, on or in connection with any goods or services, or any container for goods, uses in commerce any word, term, name, symbol, or device, or any combination thereof, or any false designation of origin, false or misleading description of fact, or false or misleading representation of fact, which —
>
> (A) is likely to cause confusion, or to cause mistake, or to deceive as to the affiliation, connection, or association of such person with another person, or as to the origin, sponsorship, or approval of his or her goods, services, or commercial activities by another person...
>
> shall be liable in a civil action by any person who believes that he or she is or is likely to be damaged by such act."[1]

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[1] The Sixth Circuit's contention that Petitioner did not make clear which provision of § 43(a) he was relying on, App. 13a, is incorrect *See* Appellant's Brief at 67 (stating "Plaintiff relied on the following language from the Lanham Act for his claim under the act" and quoting 15 U.S.C. § 1125(a)(1)(A) *verbatim*).

The relevant provisions of the Fifth and Seventh Amendments to the U.S. Constitution are reproduced at App. 152a.

STATEMENT

I. BACKGROUND ISSUES

The novel and important question of federal law presented by this Petition is whether scientific data contained in an article published in a medical journal that is offered for sale to the public constitute a communicative product to which the Lanham Act applies. Relying on this Court's *dictum* in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003), Petitioner, Romero, alleged that Respondents violated the Lanham Act by passing off research Buhimschi conducted while she was an Assistant Professor at Wayne State University (WSU), in Detroit, Michigan, with Romero and the Perinatology Research Branch (PRB) of the *Eunice Kennedy-Shriver* National Institute of Child Health and Human Development (NICHD), as work done at Yale University by a Yale team.

Romero's claim relied on the distinction *Dastar* made between a communicative product, the physical embodiment or "packaging" of the product, and the ideas embodied in the product. In *Dastar*, a unanimous Court held that the phrase "origin of goods" cannot be interpreted to connote the person or entity that originated the ideas embodied in a communicative product. *See Dastar* at 32. However, the Court emphasized *in dictum* that if a communicative product was "repackaged" and relabeled as produced by someone other than those who actually produced the

product, the person or entity that produced the product would "undoubtedly" have a cause of action under the Lanham Act. *Id.* at 31.

Romero contended that Buhimschi violated the Lanham Act by repackaging and relabeling the research and data she co-produced with Romero by falsifying the date of the first experiments, removing Romero's name from authorship, expunging everything from the original manuscript that could link the research to Romero or the PRB, and by issuing a press release that characterized the work as produced at Yale by a "Yale team" of "Yale researchers". This repackaging and relabeling created confusion within the scientific community as to where the research was conducted and by whom. Romero contended that his claim is distinguishable from a failure-to-attribute-authorship claim because Romero actually co-produced the communicative product that Buhimschi passed off as the work of a Yale team, and did not merely contribute ideas embodied in the product, or make some contribution that Buhimschi changed or modified at a later date.

The question presented is complicated by the fact that the courts below disregarded and misstated material facts relevant to both Romero's Lanham Act and defamation claims. This raises the added questions of whether a litigant, whose material evidence has been disregarded and misrepresented by the courts, has been afforded a meaningful opportunity to be heard, and whether the methods used below to dispose of Romero's defamation claims deviated so far from well-settled procedures as to call for the exercise of this Court's supervisory power.

II. BACKGROUND FACTS

This law suit originated in conduct by Buhimschi, a medical laboratory researcher, that an investigating committee at WSU (WSU-IC) determined constituted scientific misconduct, App. 156a, and that the Chairman and former Chairman of Obstetrics and Gynecology (Ob-Gyn) at Yale University (Yale) determined was inappropriate. App. 160a, ¶ 1. The misconduct related to research Buhimschi conducted with Romero and the PRB, which is housed at WSU pursuant to a service contract with NICHD.[2] Romero is Chief of the PRB, and a tenured member of the NIH.

To understand Romero's and WSU's response to Buhimschi's misconduct, it is necessary to understand the obligations created by WSU's contract with NICHD. This contract committed WSU to invoke its Policy and Procedures on Misconduct to protect the PRB from misconduct of its employees related to their collaborations with the PRB. App. 163a, ¶ 5; App. 165a. Independently of WSU's contract with NICHD, federal regulations required WSU to have policies and procedures on scientific misconduct, and to adhere to them. *See* 42 C.F.R. § 50.103.

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[2] The PRB was created pursuant to a mandate in the NIH Revitalization Act of 1993. *See* 42 U S.C. § 285g-6. It is housed off the Bethesda campus because NIH's Clinical Center does not have an Obstetrical Service. The PRB was originally housed at Georgetown University Medical Center, but NICHD terminated its contract with Georgetown because of conduct by its faculty very similar to the conduct that gave rise to this law suit. App. 163a, ¶ 4

The research at issue involved a relatively new technique for identifying proteins based on their molecular weight referred to by the acronym SELDI (SELDI research).[3] The SELDI experiments were conducted between April 11, 2002 and June 19, 2002. App. 169a, ¶ 2. The results of the research were reported in abstract form to the Society for Maternal-Fetal Medicine, App. 173a-174a, and submitted for publication to The Lancet, a prestigious English medical journal, on November 3, 2002 ("Lancet Manuscript"). App. 175a. Romero was senior (last named) author on both the Abstract and the Lancet Manuscript. App. 173a, 175a.[4] Robert Christner,

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[3] Buhimschi asked Romero to collaborate on the SELDI research at the end of March, 2002, after she returned from an educational course in Switzerland. App. 168a (Buhimschi learned the SELDI technique after she joined the WSU faculty while working on other research projects with Romero unrelated to the SELDI research at issue). Romero had already made plans to collaborate on this research with Dr. Lance Liotta's group at NIH, before Buhimschi joined the WSU faculty (on July 1, 2001), App. 171a-172a, but agreed to Buhimschi's request because Liotta's laboratory was backed up, and a key member of his team had developed health problems. Docket No. 40-#6, ¶ 6, 11, 13 & Docket No 92-#5 at 4-15 However, Romero showed Buhimschi his correspondence file with Liotta App. 169a, ¶ 1, and explained to her that if the experiments were successful the results would have to shown to Liotta to permit him to make a contribution if he could and wished to do so. Docket No. 120, ¶ 16.

[4] Buhimschi attested in writing that Romero met the criteria of authorship for manuscripts submitted to biomedical journals, App. 176a, acknowledged that the SELDI research could not have been done without Romero, App 181a, and, in an unsolicited (see App. 167a) To Whom it May Concern (TWIMC) Letter dated October 16, 2002, recounted Romero's contribution to the SELDI research. App. 169a.

Ph.D., a field scientist employed by the Ciphergen Corporation, who had expertise in the SELDI technique, assisted Buhimschi with the experiments, and helped identify the chemical nature of the proteins detected by SELDI. App. 169a, ¶ 3.[5] The Ciphergen Corporation indicated it would apply for a patent, App. 216a, and Buhimschi determined that Romero's contribution to any patentable invention in the SELDI research was equal to hers (40%), and the remainder (20%) was contributed by Christner. App. 178a-179a.[6]

The Lancet Manuscript received a favorable review, and Buhimschi notified Romero of this fact in February, 2003. App. 201a, ¶ 2. However, between submission of the Lancet Manuscript and receipt of these reviews, Buhimschi's husband, Catalin, a Fellow in the Department of Ob-Gyn at WSU, was informed that his contract would not be renewed because of concern about his clinical care and patient safety. App. 186a-190a. Buhimschi applied for a position as a research associate at Yale, and Romero gave Buhimschi a positive recommendation when Dr. Charles Lockwood, Chairman of Ob-Gyn at Yale, telephoned Romero in February, 2003. App. 159a, ¶ 3.

On March 5, 2003, before she moved to Yale, Buhimschi submitted a revised version of the Lancet Manuscript to The Lancet for publication (Revised Lancet Manuscript), from which she removed Romero's

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[5] SELDI does not identify the chemical nature of the proteins, and therefore, cannot distinguish between two proteins that have the same mass SELDI also cannot measure the concentration of proteins.

[6] The patent application was denied.

name and the names of other PRB members from authorship without telling them, and deleted any direct reference to the PRB. App. 192a. The article published in the BJOG was identical, word for word, to this Revised Lancet Manuscript, except that the date of the first experiments was falsified,[7] and the affiliation of the authors, the site of the research, and source of materials were changed. *See* App. 192a-194a; *compare* App. 195a-196a, ¶ 2. The SELDI results were not changed in any way, and the results first submitted for publication to The Lancet on November 3, 2002, resubmitted to The Lancet for publication on March 5, 2003, and ultimately published in the BJOG were all identical.[8] The WSU-IC determined that Romero was a rightful author of the Revised Lancet Manuscript. App. 156a, ¶ 2. Dr. Owen Rennert, Scientific Director of Intramural Research of NICHD,

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[7] *See* App 193a, ¶ 1(Revised Lancet Manuscript, stating that first stage experiments were conducted in April, 2002); *accord* App. 169a, ¶ 2 (TWIMC letter stating that first stage experiments were conducted between April 11-23 (2002)); *compare* 196a, ¶ 1 (BJOG article, stating that experiments were run between May, 2001 and April, 2002).

[8] In addition to stylistic changes, data that had no affect on the results, and that were contributed by individuals other than Romero, were removed. These were thirteen amniotic fluid samples collected by Buhimschi's husband, Docket No. 92-#6 at 129-30, and the results of an ELISA assay, run at Buhimschi's request, App. 180a, by two members of the PRB, Drs. Rathnasabapathy and Edwin (who were not authors on the Abstract, *see* App. 173a, because this did not include the ELISA data). ELISA is an acronym for a standard method for measuring the concentration of proteins, which Buhimschi used to check that one of the proteins identified by SELDI was what she thought it was. After the proteins were identified chemically the following month, App 169a, ¶ 3, these data were redundant.

independently determined that both Romero and Dr. Chaiworapongsa were rightful authors on the BJOG article. App. 198a, ¶ 1, 2.

The Revised Lancet Manuscript was accepted for publication, and had reached the galley proof stage, Docket No. 91-#3, when the Editor of The Lancet, Dr. Charles Young, halted publication. Docket No. 91-#4. Romero had telephoned Young to inquire about the status of the Lancet Manuscript, App. 201a, ¶ 1, and Young realized for the first time that Buhimschi had not informed her coauthors that she had removed their names from authorship. App. 202a, ¶ 1. Young asked for, Docket No. 91-#3, but did not accept Buhimschi's explanation for her actions, Docket No. 94-#1 at 1,[9] and Buhimschi withdrew the manuscript from publication. Docket No. 94-#2.

On June 2, 2003, after notifying his superiors at NICHD, Romero informed WSU officials of Buhimschi's actions, and asked that WSU resolve the matter. App. 202a, ¶ 2. Dr. Ray Stinson, WSU's Assistant VP for Research, attempted to resolve the matter without invoking WSU's Policy and Procedures

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[9] Buhimschi told Young that Romero's only contribution to the research were the ELISA data, which Romero had published without her knowledge in another journal. Buhimschi knew this was false because the publication she was referring to involved completely different research that was completed on January 29, 2002, two months before she had even asked Romero to collaborate on the SELDI study. *See supra* note 3, App. 220a, ¶ 3. Buhimschi's claims about Romero's contribution to the SELDI research were also inconsistent with the attestation she signed, App. 176a, and her own, unsolicited description of Romero's role in the SELDI research. App. 169a.

on Scientific Misconduct, App. 204a, ¶ 3, but Buhimschi failed to cooperate. App. 204a-205a. Wayne State then invoked its Policy and Procedures on Scientific Misconduct on June 12, 2003, and opened an inquiry to determine if there was sufficient evidence of misconduct to warrant an investigation. App. 205a, ¶ 8. Buhimschi again failed to cooperate, App. 206a, and since failure to cooperate with an inquiry was a reason to open an investigation, *id.*, WSU opened an investigation, App. 206a, ¶ 13, but did not commence it until September 3, 2003, two months after Buhimschi had moved to Yale. App. 208a-209a. On June 30, 2003, Romero, acting on instructions of NIH attorneys, informed Stinson that he agreed to assume the role of complainant for the purposes of the investigation. App. 210a-211a. Dr. John Malone, WSU's Chairman of Ob-Gyn, and Dr. Robert Sokol, former Dean of WSU Medical School and Chairman of Ob-Gyn, asked to be added as complainants. App. 206a, ¶ 12.

Buhimschi also failed to cooperate with WSU's investigation. App. 153a-154a. She did not testify at the hearing before the WSU-IC on January 26, 2004, *id.*, even though WSU offered to pay her and her husband's travel expenses, Docket No. 39-#12 at 14, ¶ 4, and she did not provide any of the information and documents the WSU-IC had requested. App. 154a, ¶ 1. Buhimschi alleged that WSU could not provide her due process because of a conflict of interest created by its contract with NICHD to house the PRB. App. 154a-155a, 184a, ¶ 3. Her allegations were considered by the WSU-IC, but no conflicts were identified. App. 155a, ¶ 1.

In late July, 2003, after she had moved to Yale, Buhimschi informed Lockwood of her actions, App. 159a-160a, and justified them by claiming that Romero's only contribution to the research was removed from the Revised Lancet Manuscript, App. 160a, ¶ 1, and that Romero asked her to add "another NIH employee" as an author, even though he had made no contribution to the research. *Id.* Buhimschi knew that both claims were untrue. *See e.g.* App. 169a (describing Romero's contribution to the SELDI research); App. 216a-217a (acknowledging that offer of authorship to Liotta was contingent on him wanting to, and being able to make a contribution that would warrant authorship). Later Buhimschi told Yale officials that Romero had "required her to add himself and three others and their data for his own professional advantage". App. 184a, ¶ 2; *compare* App. 180a (indicating that the data referred to - the ELISA assays - were run at Buhimschi's, not Romero's, request).

After Lockwood told Buhimschi that her actions had been inappropriate, Buhimschi consulted Lockwood's predecessor as Chairman of Ob-Gyn, Dr. Frederick Naftolin, who also concluded that Buhimschi's actions had been inappropriate. App. 160a, ¶ 1. On July 11, 2003, Naftolin telephoned Romero, and on August 15, 2003, met with Romero in Washington, D.C. to discuss the reasons Buhimschi had given for her actions at Yale, Docket No. 120, ¶ 19, 20, and relayed the information he received from Romero to Dr. Lawrence Cohen, Yale's Research Integrity Office and Special Advisor to the Dean of Yale Medical School. App.158a. Naftolin withdrew from involvement in the matter after WSU commenced

its investigation in September, 2003. Docket No. 126-#8.

On October 14, 2003, Romero responded to several emails in which Buhimschi professed an interest in resolving the dispute, and copied Lockwood on his letter. App. 218-221a. Lockwood told Romero that he had the support of Yale at its highest levels, App. 222a, and later advised Buhimschi to do everything to resolve the dispute because if WSU had jurisdiction, and found that she had engaged in misconduct, Yale would have to take action. App. 223a. However, far from having any intention of correcting her actions, Buhimschi asked her former Chairman at the University of Maryland, Dr. Carl Weiner to contact the Editor of the BJOG, Professor Jim Thornton, to inquire if the BJOG would be interested in publishing the Revised Lancet Manuscript. Docket No. 35-#5.

In an email dated October 10, 2003, Weiner, who had been removed from his position as Chairman by that time, related a totally fabricated account of the SELDI research to Thornton, and made numerous false defamatory statements about Romero to induce Thornton to publish the Revised Lancet Manuscript in the BJOG. Docket No. 35-#5, App. 49a, ¶ 3. For example, Weiner claimed that Romero had no knowledge of the SELDI research until he saw "the finished product", that Romero deceived his superiors at NICHD about the origins of the SELDI research, and that Romero was claiming "authorship" on the Lancet Manuscript because he wanted to assert rights to a patent, Docket No. 35-#5, when exactly the opposite was true. *See* App. 167a. Weiner even claimed that the SELDI research began in his laboratory in Maryland, Docket No. 35-#5, and Buhimschi falsified

the date of the first stage SELDI experiments in Revised Lancet Manuscript she submitted to the BJOG to corroborate this false representation. *See supra* n. 7.[10] Thornton told Weiner the "BJOG likes controversy", but that he would have to contact Romero to get his version of events, but never did. Docket No. 39-#11 at 5. The BJOG published the Revised Lancet Manuscript knowing its authorship was disputed, which the Committee on Publication Ethics (COPE) determined violated editorial standards for publications in biomedical journals. App.224a-225a.

On May 19, 2004, the WSU-IC published its findings and conclusions that Buhimschi's conduct had seriously deviated from commonly accepted practices within the scientific community related to research, and constituted scientific misconduct. App. 156a. The committee found Buhimschi's explanations for her actions inconsistent and contradictory, and concluded that she had engaged in a pattern of deception and obfuscation, and had done "everything in her power to prevent the removed co-authors...from seeing the reviews of the original manuscript and the revised manuscript". App. 156a, ¶ 2. The WSU-IC found no substance to Buhimschi's claim that she had made many efforts to resolve the dispute. App. 155a, ¶ No. 19.

Wayne State's Procedures required WSU to notify a variety of individuals of a finding of misconduct.

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[10] Falsification of the date of the first stage experiments were necessary to corroborate Weiner's false representations to Thornton because Buhimschi joined the WSU faculty in July, 2001, and, therefore, experiments conducted in April, 2002, could not have begun in Weiner's laboratory in Maryland.

Docket No.125-#7 at 7, ¶ 7.2. On October 7, 2004, Dr. John Oliver, WSU's Vice President for Research, notified these individuals of WSU-IC's findings, including Yale officials. Docket No.130-#5. On October 19, 2004, Stinson wrote to Cohen specifically asking Yale to ensure that the SELDI research was not published without proper attribution, and to assist with placing the raw data in the public domain, consistent with NIH's policy. Docket No.130-#6 at 1.[11]

However, by the time Cohen received Stinson's request, Yale had already received a two million dollar grant based on the SELDI research Buhimschi had conducted in Detroit with Romero, Docket No. 130-#8 at 2, and the BJOG had already accepted the revised *Lancet Manuscript* for publication (on June 16, 2004). App. 196a. By the time Cohen responded to Stinson's letter on December 17, 2004, Docket No. 130-#6 at 4, the BJOG had already published the Revised Lancet Manuscript in electronic form (on November 11, 2004), App. 229a-230a, and Buhimschi was working with Yale's publicity department on a press release that described the work Buhimschi did at WSU with Romero and the PRB as that of "Yale researchers" and a "Yale team". App. 231a-233a.

Cohen failed to inform Stinson of these facts. Docket No. 130-#6 at 4. He extemporized on a number of pretexts, *see* Docket Nos. 153-#11, while misleading Stinson into believing that Yale intended to cooperate

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[11] There had been a long standing agreement between Deans of universities that they would accept each other's findings regarding scientific misconduct. Docket No.153-#18, ¶ 3. WSU anticipated that Yale would abide by this understanding. *Id.*

with WSU to insure that the SELDI research was not inappropriately published. Contrary to the court's representation that "When the committee's findings were forwarded to Yale medical school...Yale responded by appointing a committee of its own", App. 53a, ¶ 3, Yale did not appoint an ad hoc committee until May 4, 2005, App. 183a, long after the SELDI research was published in the February, 2005 issue of the BJOG, App. 195a, and WSU's requests were impossible to satisfy. The ad hoc committee Cohen appointed also extemporized on a variety of pretexts, and never actually investigated Buhimschi's actions. Docket No. 153-#18.

On January 20, 2005, Buhimschi appealed the WSU-IC's finding that she had engaged in scientific misconduct, and submitted a 31-page, single-spaced Appeal Letter, to which she attached 114 exhibits. Docket No. 119-#4. An appeal under WSU's Procedures is limited to "specific elements or portions of the final report which the respondent believes to be in error". Docket No.125-#7 at 8, ¶ 10.3. In her Appeal Letter, Buhimschi did not deny her conduct or identify any errors in the WSU-IC's report, but launched personal attacks on Romero (and WSU officials), and accused Romero of numerous improprieties related to the SELDI research. Docket No.119-#4, ¶ 1.3, 1.5, 1.9, 1.12, 1.13, 1.20, 1.25, 1.26, 2.8 and 3.1. Buhimschi's allegations were concocted and scandalous. *See* App. 46a-48a, 184a. Contemporaneous business and laboratory records,[12] and Buhimschi's own written and

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[12] *See e.g.* App. 180a; Docket Nos. 135-#1, 135-#3, 135-#5.

recorded statements,[13] proved that Buhimschi knew her statements were false, App. 261-264a. The appeal was denied on February 16, 2005. Docket No. 95-#8 at 12.

Romero first learned that Buhimschi had resubmitted the Revised Lancet Manuscript for publication to the BJOG, and that the BJOG had accepted the manuscript for publication, on January 26, 2005, when he received a copy of Yale's press release. App. 231a-233a. Romero showed the press release to Oliver who then wrote to Thornton on January 31, 2005, to inform Thornton that the research published in the BJOG was conducted at WSU, not Yale, and that Buhimschi was found to have committed scientific misconduct for removing the names of her research collaborators from the Revised Lancet Manuscript. App. 234a-236a.

Oliver wanted to know what information was provided to the BJOG to induce it to publish the Revised Lancet Manuscript. App. 235a, ¶ 4,5. Thornton explained the understanding on which the Revised Lancet Manuscript was accepted for publication, and identified several documents he had received from Buhimschi and Weiner on which that understanding was based, which included the October 10, 2003 email Thornton had received from Weiner. App. 238a. However, Thornton indicated that before he could provide copies of these documents to WSU, he would have to obtain Buhimschi's and Weiner's permission because the documents were provided to him in confidence. *Id.*

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[13] *See e g* App. 169a, 175a, 178-179a, 216a-217a.

On March 14, 2005, Buhimschi responded to Thornton's request for permission to provide copies of her correspondence with the BJOG to WSU by sending Thornton a copy of her Appeal Letter and exhibits. App. 2264a. Buhimschi misled Thornton into believing that the Office of Research Integrity (ORI) had determined that she had not engaged in scientific misconduct, and that the contrary finding by WSU was based on incomplete information, and bias from a conflict of interest. *Id.* In fact, ORI had instructed Buhimschi not to refer to ORI in connection with this matter because ORI had no jurisdiction in the matter. App. 228a. The BJOG accepted Buhimschi's representations about ORI and her not having received due process as true, and Professor Philip Steer, who replaced Thornton as Editor, issued a statement that the BJOG would correct the authorship of the BJOG article "should an appropriately constituted body after due process recommend a correction of authorship". App. 2253a, ¶ 2. Romero's defamation claims were based on the publication of Buhimschi's Appeal Letter to the BJOG and subsequently to Yale officials, and on the defamations contained in Weiner's email, Docket No. 35-#5, and Cohen's letter to Yale officials, App. 184a-185a.

III. DECISIONS BELOW

A. Lanham Act Claim.

The district court accepted the Report and Recommendation of the Magistrate, and held that Petitioner's claim was foreclosed by this Court's decision in *Dastar*. App. 95a-96a. The Sixth Circuit affirmed, and, like the district court, construed Petitioner's Lanham claim to be a claim for failure to

attribute authorship, which failed to state a claim under *Dastar*'s holding.

> "To the extent that Romero's claim relies on § 43(a)(1)(A)'s 'origin of goods' prong, the claim clearly falls within the scope of *Dastar*. Aside from the fact that Dastar involved a video and this case involves a manuscript, the cases are nearly identical because both plaintiffs alleged that the defendants used portions of the plaintiff's work but failed to attribute the work to the plaintiffs." App. 14a.

The court's analogy ignored the crucial difference between the facts of this case and *Dastar*. In *Dastar*, defendants took non-copyrighted material in the public domain, and used it to create its own product - the Dastar Video. *Dastar*, 539 U.S. at 26-27. In this case, Buhimschi did not take "contributions" by Romero and incorporate them into a new communicative product. Buhimschi simply repackaged the *identical* SELDI research and results she co-produced with Romero, did not change or alter the product in any way, and relabeled it by falsifying the date of the first experiment, removing Romero's name from authorship, obfuscating the site of the research, and by passing the research off as conducted at Yale by a Yale team to create confusion within the scientific community as to where the product was produced and by whom.

B. Defamation Claims.

The district court denied Respondents' motion to dismiss Petitioner's defamation claims, App. 100a-

101a,[14] but a different judge subsequently declared Romero's defamation claims nonjusticiable, App. 30a, and dismissed them on summary judgment. Relying on an unpublished case, and three published cases by the Michigan Court of Appeals that have no precedential value in Michigan, and had no facts analogous to the facts of this case, App. 50a-53a,[15] the district court held that, as a matter of Michigan law, a person consents to the publication of defamation with actual malice merely alleging wrongdoing against another person. *Id.* The court stated that "Romero claims that each of these publications amounts to defamation per se, entitling him to judgment against Buhimschi...", but failed to acknowledge Romero's evidence proving that Buhimschi published her defamations with actual malice - i.e. with knowledge or reckless disregard of falsity - on which Romero actually based his entitlement to judgment. App. 50a.

The court held that the notification WSU provided to Yale about its finding of scientific misconduct constituted an invitation *by Romero* from which his consent to the publication of Buhimschi's Appeal letter

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[14] The court dismissed Petitioner's defamation claim against Weiner based on the Michigan Supreme Court's decision in *Mitan v. Campbell*, 706 N.W.2d 420 (Mich. 2005), decided during the preparation of the complaint, which changed Michigan's law of republication. *See* Nicholas Kadar, *Mitan v. Campbell: The Michigan Supreme Court's Analysis Changes Common Law Of Republication And Protects Repetitions of Defamations That Have No Social Value*, 54 Wayne Law Rev. 1701 (2008).

[15] By statute, decision of the Michigan Court of Appeals prior to 1990 have no precedential value in Michigan. *See* MCR 7 21(j). The court relied on three published cases, which were decided in 1980, 1978 and 1964.

(written three months later) and Weiner's email (which Romero knew nothing about at the time) at Yale was implied as a matter of Michigan law. App. 53a. The court characterized these republications as "prompted" by Romero, *id.*, disregarded that WSU's Policy and Procedures *required* WSU to notify Yale, and that federal regulations *required* WSU to have policies and procedures on scientific misconduct, *see* 42 C.F.R. § 50.103, and held that it would be an "impossibly strained reading of the facts" to construe that WSU submitted the report to Yale "on its own initiative". App. 54a. Similarly, the court held that Romero's consent to the republication of Buhimschi's Appeal Letter to the BJOG was implied as a matter of Michigan law from Oliver's January 31, 2005 letter to Thornton. App. 53a.

Petitioner moved for reconsideration, and drew the court's attention to several omissions and misstatements of material fact in the court's opinion, and to limitations on the scope of implied consent the court had overlooked. Docket No. 154-#1. The court denied the motion. App. 89a. Although the court stated that it was inclined to agree with Petitioner that, as a matter of public policy, there was no good reason to imply consent to defamations published with actual malice, the court interpreted "silence" on this question in the cases on which the court relied as implicit rejection of this argument. App. 78a, n. 7.

The Sixth Circuit, also relying entirely on unpublished cases and decisions that have no precedential value in Michigan, App. 20a-22a,

affirmed.[16] The court declined to correct the district court's omissions and misstatements of material fact, *see* App. 240a-244a, and compounded them with additional factual assertions that were not true. *See e.g.* App. 6a, ¶ 3 (stating that BJOG published the article at issue without Romero or his team, "In spite of Romero's protests"); *see also* App. 250a-251a. The panel distinguished *Smurthwaite v. News Pub. Co.*, 83 N.W. 116 (Mich, 1900), the only Michigan Supreme Court case it considered, and misleadingly implied that Romero had relied only on *Smurthwaite*. App. 23a. The court disregarded the other Michigan Supreme Court decisions on which Romero had actually relied, including *Dadd v. Mount Hope Church*, 780 N.W.2d 763 (Mich. 2010), App. 20a-28a, which was decided during the pendency of the appeal, but drawn to the court's attention through Fed. R. App. P. 28(j).

WHY PETITION SHOULD BE GRANTED

I. LANHAM ACT CLAIM.

The Court should grant petition on Petitioner's Lanham Act claim because the Sixth Circuit decided an important question of federal law that has not been, but should be, settled by this Court, and decided it in a way that conflicts with the Court's decision in *Dastar Corp. v. Twentieth Century Fox Film Corp.*, 539 U.S. 23 (2003). Sup. Ct. R. 10(c).

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[16] Only three of the eight decisions relied on by the appellate panel were published, which were the same published cases as relied on by the district court.

In *Dastar*, this Court distinguished between a "repackaging" claim, and a claim for failure to attribute authorship. *Dastar* at 31-32. The distinction was implicitly based on the difference between a communicative product and its physical embodiment or "packaging". The Court explained that the purpose of the Lanham Act was to insure that those who made a communicative product derive not only the financial but also the "reputational-related rewards" of a desirable product, *Dastar* at 34 (citation omitted), and emphasized in *dictum* that repackaging of a communicative product that, by implication, deprived someone who actually made the product of the reputational-related rewards for making it, would "undoubtedly" give rise to a claim under the Lanham Act. Romero's repackaging claim was based on *Dastar*'s *dictum*.

"Reputational-related rewards" are the main rewards scientists or physicians engaged in academic research derive from their work product, and these rewards accrue only if their research is published to the scientific community in a peer-reviewed journal. The NIH considers such publications to be "the fulfillment of the responsibility to communicate research results to the scientific community for external evaluation", Docket No. 111 (#8) at 10 (Guidelines for the Conduct of Research in the Intramural Program of NIH), and to be essential to the advancement of knowledge. *Id.* at 9.

If, as occurred in this case, a scientist's work product is repackaged and relabeled to create confusion within the scientific community as to where the research was conducted and by whom, the scientist is deprived of the reputational-related reward from his

or her work that the Lanham Act protects. The policy of external evaluation will also be frustrated, and will likely lead to misallocation of resources by diverting public research funds away from their most productive use as a result of the false designations.

The courts below denied Petitioner the reputational-related rewards of the SELDI research by erroneously equating authorship on scientific article published in a peer-reviewed journal with authorship of a textbook. App. at 12a (citing *Zyla v. Wadsworth*, 360 F.3d 243 (2004)). This analogy is flawed, misconstrues the nature of the communicative product in each case, and frustrates an important purpose of the Lanham Act - to protect reputation-related rewards that accrue from the production of a desirable communicative product. *Dastar* at 34.

In the case of a textbook, the book itself is the communicative product. The authors are entitled to the reputational-related rewards that accrue from the sale of the book, but there is no "communicative product" apart from the textbook itself that the authors have produced, and that entitles them to any reputational-related rewards over and above that which accrues from the textbook itself.

An article published in a scientific or medical journal is neither a work of literature nor pedagogy, and its authors stand in a different relationship to the text from the authors of a textbook. In the case of such an article, the authors have produced an actual communicative product that is separate from the text itself - the research results or data. It is these results, and the methods by which they were obtained, that

constitutes the communicative product, not the prose used to convey them.

The research and its results, not the text, are what is of interest to the scientific community. They determine whether an article will be accepted for publication, and the reputational-related rewards that will accrue to the authors from the article. The text or prose is merely the medium used to convey the communicative product of interest to the target audience. Indeed, The Lancet made substantial editorial changes to the text of the Revised Lancet Manuscript it was about to publish, *see* Docket No. 91-#3, whereas the BJOG made no changes to the text of the Revised Lancet Manuscript before publishing it. Clearly, however, the communicative product contained in the article The Lancet was about to publish was identical to the product the BJOG actually published, notwithstanding differences in the style of the prose. Similarly, none of the changes Buhimschi made to the Lancet Manuscript before resubmitting it to The Lancet as the Revised Lancet Manuscript altered the communicative product ultimately published in the BJOG in any way. Buhimschi merely repackaged the communicative product, and relabeled it to create confusion within the scientific community as to where the work was done and by whom.

Thus, Romero actually co-produced the communicative product published in the BJOG, and did not merely contribute ideas to it or make contributions that Buhimschi subsequently altered in any way. Given the importance of preserving the integrity of the scientific record to scientists and the advancement of knowledge, the Court should grant petition to decide whether the Lanham Act protects

the reputational interests of scientists in the research they have actually produced, as distinct from research to which they have contributed only ideas.

II. DEFAMATION CLAIMS.

The Court should also grant Petition to review the methods by which the Sixth Circuit decided a dispositive question of state law, and dismissed Petitioner's defamation claims on summary judgment, because they departed so far from well-settled procedures as to undermine the integrity of judicial proceedings, and call for the exercise of this Court's supervisory power. *See* Sup. Ct. R. 10(a). This Court has authority not only to correct errors of substantive law committed by the Court of Appeals, but also "to prescribe the method by which those courts go about deciding the cases before them". *See Lehman Brothers v. Schein*, 416 U.S. 386, 393 (1974) (Rehnquist, J., concurring). "By insisting that courts comply with the law, parties vindicate not only the rights they assert but also the law's own insistence on neutrality and fidelity to principle." *See Hollingsworth v. Perry*, 130 S.Ct. 705, 713 (2010).

A. The Sixth Circuit failed to decide a question of Michigan law consistent with decisions of the Michigan Supreme Court.

The Sixth Circuit was required to decide whether Romero impliedly consented to Buhimschi's defamations as a matter of law as the Michigan Supreme Court would decide that question. *Baker v. General Motors Corp.*, 522 U.S. 222, 249 (1998); *Mullaney v. Wilbur*, 421 U. S. 684, 691 (1975). The Sixth Circuit was also required to decide that question

consistent with the Michigan Supreme Court's decision in *Dadd*, *supra*, rendered during the pendency of the appeal in this case. *See Huddleston v. Dwyer*, 322 U.S. 232, 236 (1944); *Vandenbark v. Owens-Illinois Glass Co.*, 311 U.S. 538, 543 (1941). Nevertheless, the Sixth Circuit disregarded these well-settled procedures, and ignored *Dadd* and other Michigan Supreme Court decisions.

In several early decisions, the Michigan Supreme Court repeatedly held that only a qualified privilege attached to statements that were "invited" or made in response to allegations of wrongdoing,[17] unless the plaintiff had herself published, or effectively published, the defamations.[18] App. 252a-257a. In *Smurthwaite*, 83 N.W. at 118, the court held that a person may not respond to an "attack" by making defamatory statements of a general nature or false statements with malice. Since consent creates an absolute privilege that bars a consenting party from recovering for injuries caused by consented to activities, *see Smith v. Calvary Christian Church*, 614 N.W.2d 590, 594 (Mich. 2000), these early decisions made it clear that the Michigan Supreme Court would

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[17] *Fortney v Stephan*, 213 N.W. 172, 173 (Mich. 1927) (absolute privilege does not attach to defamations about public officials that are "invited" if false statements are published with knowledge of falsity); *Schultz v. Guldenstein*, 106 N W 96, 97 (Mich. 1906) (defendant's response to a demand to know if he was alleging that a person stole his money is absolutely privileges only if the responses were "honest").

[18] *Shinglemeyer v. Wright*, 82 N.W. 887, 891 (Mich. 1900) (no difference between plaintiff soliciting a defamatory statement about herself, and reading out a defamatory statement in a letter she received, and for which she cannot recover).

not imply consent to defamations published with actual malice - the type of defamations at issue in this case - in response to allegations of wrongdoing, as a matter of law. This conclusion was reinforced by court's more recent affirmation of "society's 'pervasive and strong interest in preventing and redressing attacks upon reputation' caused by false and defamatory statements". *Locrichhio v. Evening News Ass'n*, 476 N.W.2d 112, 114 (Mich. 1991) (citation omitted).

Nevertheless, the Sixth Circuit disregarded these Michigan Supreme Court decisions, and, based entirely on unpublished cases and decisions that have no precedential value in Michigan, App. 25a, held that Romero impliedly consented to the defamations Buhimschi published about him with actual malice because he had "invited" these defamations. App. 22a-23a. Although the court justified reliance on these cases stating, "we find it difficult to ignore the similarity between these cases and Romero's case", App. 25a, none of the cases on which the court relied actually had facts analogous to Romero's case, none involved publications with actual malice, and none explicated the doctrine of implied consent, to justify reliance. *See* App. 257a-260a. The panel dismissed, *Smurthwaite*, the only Michigan Supreme Court case it considered, as having dubious precedential value in light of this Court's subsequent decision in *New York Times v. Sullivan*, 376 U.S. 254 (1964), App. 26a, notwithstanding that the Michigan Supreme Court re-affirmed *Smurthwaite*'s central holding in *Dadd*, *supra*. App. 255a-257a.

The facts of *Dadd* were directly analogous in all material respects to the facts of this case - i.e.

plaintiff's suit was based on defamatory statements the defendant published in response to allegations of wrongdoing by the plaintiff. *Dadd*, 780 N.W.2d at 764-65. *Dadd* held that under Michigan law only a qualified privilege attached to statements made in response to allegations of wrongdoing. *See* App. 256a-257a; *Dadd* at 763, 767-70. Therefore, *Dadd* made it clear that Michigan's law of consent had not changed since *Smurthwaite* was decided. *See* App. 256a-257a. Nevertheless, the appellate panel disregarded this Court's directive that federal courts must decide questions of state law consistent with intervening decisions of the state's highest court, *see Huddleston*, *supra* at 236; *Vandenbark*, *supra* at 543, and did not even mention *Dadd* in its opinion. App. 20a-28a.

B. The Sixth Circuit failed to decide a question of Michigan law consistent with Sixth Circuit precedent.

The appellate panel was also required to follow interpretations of state law of a prior panel unless the court took the case en banc or an intervening decision by the state's highest court indicated that it would decide the question of state law differently. *See Rutherford v. CLMBA Gas*, 575 F.3d 616, 619 (6th Cir. 2009). The appellate panel disregarded this procedural rule as well, and ignored a prior panel's interpretation of Michigan law that consent will not be implied to the publication of defamatory statements where the plaintiff has made his or her disagreement with the statements known to the defendant. *See Compuware v. Moody's*, 499 F.3d 520, 526 (6th Cir. 2007).

In this case, Romero made his disagreement with several defamatory statements in Buhimschi's Appeal

Letter known to Buhimschi and Yale officials before they were published in her Appeal Letter through, *inter alia*, his discussions with Naftolin in July/August, 2003, Docket No. 120, ¶ 19, 20, and his October 14, 2003 letter on which Romero copied Lockwood. App. 220a, ¶ 3; App. 245a-246a. Nevertheless, the panel disregarded these facts, ignored *Compuware* altogether, notwithstanding that it was briefed extensively, App. 245a-248a, and held that Romero impliedly consented to the publication of every false defamation Buhimschi had published about him with actual malice. *See e.g.* App. 261a-264a.

C. The Sixth Circuit refused to correct omissions and misstatements or material facts that distorted the record.

The courts below also disregarded well-settled procedures to decide whether Romero consented to Buhimschi's defamations as a matter of fact. Unless consent is implied as a matter of law by the law of the forum, consent, and the scope of consent, are questions of fact to be determined from the totality of the circumstances by a jury unless reasonable minds could not differ as to whether the plaintiff consented to the activity about which he or she has complained. *See Lewis v. Legow*, 670 N.W.2d 675, 688-89 (Mich. App. 2003) (extent of consent depends on the facts and circumstances of the case); *accord* Restatement (Second) of Torts, § 583, cmt c. Far from considering the totality of the circumstances, and viewing them in a light most favorable to Romero as they were required to do, *Dalley v. Gossett*, 788 N.W.2d 679, 690 (Mich.App. 2010), the courts below disregarded the obligations that flowed from WSU's contract with NICHD and 42 C.F.R. § 50.103, and misstated both

material facts and the chronology of events to justify finding consent in this case.

To obfuscate the fact that Buhimschi's incorrigibility caused WSU to invoke its Policy and Procedures on Scientific Misconduct, the district court asserted that "it was Romero who invoked Wayne State disciplinary proceedings to which Buhimschi's original appeal letter was a response", App. 53a, ¶ 3, and that "Buhimschi participated in the ensuing scientific misconduct investigation in a limited way ...[because] *while the investigation was ongoing*, she and her husband were in the process of moving to Yale". App. 45a, ¶ 2 (italics added). These statements were not true.

The record before the court made it clear that WSU invoked its Policy and Procedures, and opened an inquiry on June 12, 2003, App. 205a, ¶ 8, because Buhimschi refused to cooperate with Stinson's informal attempts to resolve the problem Buhimschi had created, App. 204a, ¶ 3 & 4, and not because Romero asked WSU to invoke its disciplinary procedures. App. 219a, ¶ 2. On the contrary, when Romero notified WSU officials of Buhimschi's actions, he expressed the hope that the matter could be resolved *without* WSU having to invoke its Policy and Procedures on Scientific Misconduct. *Id.*, *accord* App. 204a, ¶ 3. In fact, Romero was instructed *not* to direct Wayne State University in the handling of this matter. App. 219a, ¶ 2.

Once Buhimschi refused to cooperate, WSU was *obligated* to invoke its Policy and Procedures on Scientific Misconduct in response to Buhimschi's actions by the terms of its service contract with

NICHD. App. 163a, ¶ 5. App 165a. NICHD insisted on this condition to protect the Branch, App. 219, ¶ 2, based on the Branch's previous experience at Georgetown. App. 163a, ¶ 4. Romero agreed to act as a complainant on June 30, 2003, App. 210a-211a, after WSU had already invoked its Policy and Procedures on June 12, 2003, App. 205a, ¶ 8, and only because he was instructed to do so by NIH attorneys. App. 210a-211a. Malone and Sokol joined as complainants. App. 206a, ¶ 12. These actions had nothing to do with protecting Romero's reputation, App. 214a, ¶ 8, as the court opined. App. 54a.

Buhimschi's refusal to cooperate with Stinson's informal "pre-inquiry", and the subsequent inquiry to determine if there was sufficient evidence to open an investigation, occurred during June, 2003, *before* Buhimschi resigned from WSU (on June 26, 2003) and moved to Yale. App. 204a-205a. The *investigation* into allegations of scientific misconduct commenced on September 3, 2003, App. 208a-209a - *two months after* Buhimschi moved to Yale - and the hearing into the allegations of scientific misconduct was held on January 26, 2004, App. 153a, more than *six months after* Buhimschi moved to Yale. Buhimschi failed to cooperate with the investigation, failed to attend the hearing, App. 154a, even though WSU offered to pay her and her husband's travel expenses, Docket No. 39-#12 at 14, and failed to provide any of the documents or information the WSU-IC had requested. App. 153a-154a. Manifestly, Buhimschi was *at* Yale, throughout the time "the investigation was ongoing", and her move to Yale had nothing whatsoever to do with her total refusal to cooperate with the pre-inquiry, inquiry or the investigation.

To portray Buhimschi's defamations as "invited" by Romero, the district court's opinion further distorted the chronology of events by characterizing Buhimschi's defamations as simply responses to earlier accounts of the same events by Romero to "various fora". App. 44a-45a. The record, however, indicated that Buhimschi published her defamations proactively to "various fora" either to justify her misconduct, as in the case of Yale, App. 159a-160a, or to secure publication of the Revised Lancet Manuscript without including Romero or other PRB members, as in the case of the BJOG, App 238a; Docket No. 35-#5, *before* Romero was ever aware of her publications.

Buhimschi actually chose *not* to respond to the allegations of scientific misconduct with her version of events in the only forum that mattered, and the only one in which she was authorized by WSU's Policy and Procedures to respond - the hearing before the WSU-IC. App. 154a.[19] Nevertheless, the district court implied that the opposite was true by holding that "no reasonable jury could find that Romero did not invite not only Buhimschi's attempts to clear her name before the Wayne State committee, but presentation of her side of the story to Yale and to the BJOG." App. 54a.

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[19] Buhimschi's Appeal Letter was also not a response to Romero's *allegations* of scientific misconduct, or any other solicitation Thornton did not ask Buhimschi to respond to Oliver's letter of January 31, 2005. Thornton merely asked Buhimschi for permission to give WSU officials copies of her earlier correspondence with the BJOG. App. 238a (last para). Buhimschi had already published her version of events through Weiner's email. *Id.* (acknowledging possession of Weiner's email from October 10, 2003)

Far from correcting these and other distortions of the record, *see* App. 240a-244a, the Sixth Circuit compounded them. *See* App. 250a-251a. For example, the court stated, "In spite of Romero's protests, the BJOG published the manuscript, without giving credit to Romero or his team at Wayne State University, in early 2005". App. 6a. This statement was false. The BJOG had expressly stated that it had "neither the ability nor the obligation to investigate the authorship of every manuscript submitted." App. 224a.

Wayne State - not Romero - first "protested" the publication of the BJOG article on January 31, 2005, App. 234a-236a, seven and a half months after the BJOG had already accepted the article for publication (on June 16, 2004). App. 196a. By the time Oliver wrote to Thornton on January 31, 2005, the BJOG had already published the article electronically (on November 11, 2004), App. 229a-230a, and Yale had already issued its press release (on January 26, 2005) to announce the forthcoming publication of the article in the February, 2005 issue of the BJOG. App. 231a-233a. Romero had no contact with the BJOG until July, 2005, five months after the BJOG had already published the article in "hard copy". Docket No. 39-#13 (Romero's July 13, 2005 letter to Thornton).

D. The processes used by the courts below should be rejected to preserve public confidence in the legal system.

The processes used below to decide a question of state law, and dismiss Romero's defamation claims on summary judgment, are inconsistent with "the law's insistence on neutrality and fidelity to principle", *see Hollingsworth*, *supra* at 713, and, if allowed to stand,

will erode public confidence in our legal system because they cannot be concealed from the public in an age of electronic court records and the Internet.

> "Public confidence in this court or any other is premised on the certainty that the court follows the rules in every case, regardless of the question that a particular case presents. Unless we expose to the public view our failures to follow the court's established procedures, our claim to legitimacy is illegitimate."

See Grutter v. Bollinger, 288 F.3d 732, 815 (6th Cir. 2002) *aff'd* 539 U.S. 306 (2003) (Batchelden, J., dissenting). This Court should exercise its supervisory power, and reprove these methods to vindicate the rule of law.[20]

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[20] *See generally*, Brian Z. Tamanaha, *How an Instrumental View of Law Corrodes the Rule of Law*, 56 DePaul L. Rev. 469 (2006-2007)

CONCLUSION

The Petition for Certiorari should be granted.

Respectfully submitted,

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